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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Petition of **Supra Telecommunications & Information Systems, Inc. ("Supra")**	)	
Pursuant to Section 252(e)(5) of the	)	
Communications Act for Preemption of the	)	
Jurisdiction of the Florida Public Service Commission	)	CC Docket No. 02-238
("FPSC") Regarding the FPSC's failure to act on	)	
Supra's request for mediation pursuant to	)	
Section 252(a)(2) or subsequent arbitration pursuant to	)	
Section 252(b)(1) on unresolved issues clearly and specifically set forth in the parties' petition and response.	)	

PETITION OF SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC. ("Supra") PURSUANT TO SECTION 252(e)(5) OF THE COMMUNICATIONS ACT

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC. ("SUPRA"), by their undersigned counsel and in accordance with Section 252(e)(5) of the Communications Act (the "Act"), 47 U.S.C. §252(e)(5), and Section 51.803 of the FCC's rule and regulations, 47 C. F. R. §51.803, respectfully petition the Federal Communications Commission ("FCC") to preempt the jurisdiction of the Florida Public Service Commission ("FPSC") which failed to act on a specific request for mediation or arbitration involving the merits of unresolved issues clearly and specifically set forth in the parties' petition and response.

Specifically, SUPRA requests the FCC to issue a preemption order and assume jurisdiction over all unresolved issues and order the parties to mediate in accordance with section 252(a)(2) and if the parties cannot reach an accommodation to hold an arbitration proceeding (i.e. evidentiary hearing) pursuant to section 252(b)(1). Notably, the FCC has already faced a similar circumstance. Following a dismissal by the Virginia State Utilities

Commission of Starpower Communication's petition for interpretation and enforcement of its reciprocal compensation arrangements with Verizon, Starpower sought an order from the FCC preempting the Virginia Commission's jurisdiction. The FCC granted Starpower's request.[1] In the Starpower request, the Virginia State Utilities Commission expressly declined to resolve the merits of the issues properly set forth. In our case, the FPSC has also expressly declined to resolve the merits of issues clearly and specifically set forth in the parties' petition and response. The FCC should reach the same result here. In support thereof, SUPRA respectfully states as follows:

PARTIES

1. Supra is a "Telecommunications Carrier" pursuant to 47 U.S.C. § 153(44) and a "Local Exchange Carrier" pursuant to 47 U.S.C. § 153(26). SUPRA is a competitive local exchange carrier providing local telephone services in the State of Florida pursuant to authority granted by the FPSC.

2. BELLSOUTH TELECOMMUNICATIONS, INC. ("BellSouth") BellSouth is a "Telecommunications Carrier" pursuant to 47 U.S.C. § 153(44), a "Local Exchange Carrier" ("ILEC") pursuant to 47 U.S.C. § 153(26), a "Bell Operating Company" pursuant to 47 U.S.C. § 153(4), and an "Incumbent Local Exchange Carrier" pursuant to 47 U.S.C. § 251(h). BellSouth is providing local telephone services in the State of Florida pursuant to authority granted by the FPSC. Supra is currently BellSouth's largest competitor in the State of Florida, with over 350,000 customers (80% of which are residential).

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[1] *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, (2000) ("Starpower Preemption Decision")

INTRODUCTION

3. The 1996 Act was enacted by Congress to open up the local telephone exchange markets to competition and to secure the benefits of such competition for consumers. The 1996 Act mandates a new competitive regime and requires the removal of legal and economic impediments to local exchange and exchange access competition. Also, the 1996 Act was an act of Congress regulating interstate commerce and, in particular, telecommunications.

4. The 1996 Act, at 47 U.S.C. § 251(c)(1), imposes a duty upon ILECs (such as BellSouth) to negotiate in good faith with CLECs (such as Supra) regarding the particular terms and conditions of agreements which incorporate certain duties found in 47 U.S.C. § 251. *In re Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 F.C.C.R. 15594, at Par. 30, 1997 WL 594281 (Sept. 26, 1997). The FCC has found that Congress imposed this good-faith negotiation requirement because of the ILECs' lack of incentives and superior bargaining power since new entrants come to the table with little or nothing which the ILEC needs or wants. ¶15 First Report and Order.

5. In addition to imposing substantive duties on ILECs to foster competition in the local exchange and exchange access markets, the 1996 Act establishes procedures by which CLECs and ILECs are to arrive at interconnection agreements through a process of either voluntary negotiation and/or State Commission arbitration. The relevant procedures are as follows.

6. Under 47 U.S.C. § 252(a), any telecommunications carrier may request that an ILEC negotiate an interconnection agreement under which the requesting carrier

(or CLEC) can conduct business. The parties can then proceed to voluntarily negotiate the terms and conditions of the interconnection agreement.

7. Under 47 U.S.C. § 252(b), either party to the voluntary negotiations may petition a State Utilities Commission (i.e. the FPSC) to arbitrate any open issues which could not be resolved through voluntary negotiations. The petitioner is obligated to provide the State Utilities Commission with information regarding the unresolved issues and the positions of the parties with respect to those issues. The respondent may then provide additional issues for resolution by the State Utilities Commission. Thereafter, the State Utilities Commission is limited in its consideration to the petition and response. The State Utilities Commission is then duty bound to resolve each such issue by imposing appropriate conditions as required to implement the requirements of 47 U.S.C. § 251, any relevant FCC regulations and rulings, and various pricing standards set forth in 47 U.S.C. § 252(d).

8. Under 47 U.S.C. § 252(b)(5), the refusal of any party to continue negotiations after the State Utilities Commission has started to resolve the disputed issues, shall be considered to be a failure to negotiate in good faith as required by 47 U.S.C. § 251(c)(1).

9. After the State Utilities Commission concludes the arbitration by resolving all issues set forth in the petition and response, the parties then submit a "jointly executed agreement" which embodies the parties' voluntary negotiations together with the State Utilities Commission's resolution of those issues which under went an evidentiary process pursuant to section 252(b)(1).

10. Pursuant to 47 U.S.C. § 252(e), the State Utilities Commission is to review the voluntarily-agreed portions of the agreement to determine if such portions of the agreement discriminate against a third-party telecommunications carrier or are not consistent with the public interest, convenience and/or necessity. For the portions of the agreement that were arbitrated, the State Commission is to verify that the requirements and standards set forth in 47 U.S.C. §§ 251-52, together with any FCC regulations and rulings, have been satisfied.

11. Under 47 U.S.C. § 252(e)(5), if a State Utilities Commission fails to carry out its responsibilities under 47 U.S.C. § 252, including resolving all those issues set forth in the petition and response, the FCC shall (after notification) issue an order preempting the State Utilities Commission's jurisdiction and shall assume the State Utilities Commission's responsibilities under the 1996 Act.

12. Pursuant to 47 U.S.C. § 252(i), any telecommunications carrier may request that a local exchange carrier make available, under the same terms and conditions, any interconnection, service, or network element under any agreement with another telecommunications carrier which has been approved under 47 U.S.C. § 252. This provision is voluntary and nothing in the 1996 Act requires a telecommunications carrier to adopt any agreement under this code section.

13. Under the Federal Arbitration Act, (9 U.S.C. § 1, et seq.), arbitration provisions in contracts involving interstate commerce are valid, binding and enforceable. Enforcement of such arbitration clauses may be had in a federal district court.

14. Under Article I, Section 10, of the United States Constitution, no State may pass any law impairing the obligation of contracts. Moreover, under Amendment

XIV, Section 1, to the United States Constitution, no State shall deprive any person of property without due process and equal protection of the law.

FACTUAL BACKGROUND

15. On or about October 5, 1999, and pursuant to 47 U.S.C. 252(i), BellSouth and SUPRA entered into an Interconnection Agreement which adopted all of the terms and conditions of a then-existing agreement between BellSouth and AT&T Communications of the Southern States, Inc. ("Current Agreement").

16. Section 2.1 of the General Terms and Conditions ("GTC") of the Current Agreement provides that the agreement will expire three (3) years after the effective date thereof. *See* Composite Exhibit "A", attached hereto. Section 2.2 of the GTC states that the parties will commence negotiations toward a follow-on Agreement not later than 180 days prior to the expiration date. *See* Composite Exhibit "A", attached hereto. Section 2.3 of the GTC states that if the parties are unable to negotiate satisfactory language for a follow-on agreement, than either party may petition the FPSC to establish an appropriate follow-on agreement. *See* Composite Exhibit "A", attached hereto. Section 2.3 of the GTC also contains an "evergreen provision" which states that until the follow-on agreement becomes effective, BellSouth shall continue to provide services and elements pursuant to the terms, conditions and prices which are in effect under the Current Agreement. Thus notwithstanding any purported expiration date, the Current Agreement continues to be in full force and effect until such time as a follow-on Agreement becomes effective.

17. Section 16.1 of the GTC (including Attachment 1) states that disputes between the parties, which arise under the Current Agreement, shall be resolved through

either voluntary negotiations between the two companies or arbitration before the CPR Institute for Dispute Resolution ("CPR"), and in accordance with the Federal Arbitration Act (9 USC § 1, et seq.). *See* Exhibit "B", attached hereto. Thus, any dispute over when and how the Current Agreement is finally terminated, can only be decided by a panel of commercial arbitrators in accordance with the CPR rules and the Federal Arbitration Act.

18. Although the Current Agreement was a product of the procedures set forth in 47 U.S.C. § 252, both the "evergreen provision" and the arbitration provisions were products of voluntary negotiations. Thus, both BellSouth and SUPRA had voluntarily agreed to be bound by both provisions found in the Current Agreement.

19. The Current Agreement is the main asset of Supra and allows Supra to operate and provide telecommunications services to end-users within the BellSouth service areas in the State of Florida. In fact, all of SUPRA's approximately 350,000 customers are provided telecommunications service under the Current Agreement. Thus, the Current Agreement is a valuable property right and interest of SUPRA and is currently the most important item of business property owned by SUPRA.

20. On or about June 9, 2000, and pursuant to the Current Agreement, SUPRA made a request upon BellSouth to negotiate a follow-on agreement. The parties undertook voluntary negotiations, but were unsuccessful in negotiating the agreement.

21. As a result, on or about September 1, 2000, BellSouth filed a petition with the FPSC seeking to arbitrate certain issues related to the follow-on interconnection agreement pursuant to 47 U.S.C. § 252(b). A true and correct copy of BellSouth's petition for arbitration is attached hereto as Exhibit "C."

22. Supra filed a response to BellSouth's petition, wherein Supra added further issues for negotiation in accordance with 47 U.S.C. § 252(b)(3). A true and correct copy of Supra's response is attached hereto as Exhibit "D."

23. Between the two parties, sixty-six (66) issues were identified for resolution by the FPSC pursuant to 47 U.S.C. § 252(4). All of the 66 issues can be found in the parties' petition and response.

24. Throughout the course of the proceedings before the FPSC, several issues were divided into sub-parts and two new issues were added for resolution by the FPSC. Further, by the time the evidentiary hearing was held in late September 2001, the parties had cumulatively identified 71 issues, which were numbered Issue A, Issue B, and Issues 1 through 66 (with issues 11, 25 and 32 having two parts each (i.e., 11A, 11B, 25A, 25B, 32A and 32B)).

25. Issue B was added by the FPSC on September 25, 2001, just before the evidentiary hearing. Issue B posed the question as to which template was to be used for inserting the parties' voluntary agreements together with the Commission's resolution of issues.

26. During the course of the proceeding, the parties thought they had reached tentative agreements on many of the issues set forth in the parties' petition and response. As a result of these tentative agreements, the parties agreed not to present these issues at the evidentiary hearing that took place on September 26-27, 2001. The issues for which BellSouth and Supra thought they had reached tentative agreements were identified in the proceeding as follows: Issue A, Issues 2, 3, 6, 7, 8, 9, 13, 14, 17, portions of 18, 25A,

25B, 26, 27, 30, 31, 35, 36, 37, 39, 41, 43, 44, 45, 48, 50, 51, 52, 53, 54, 55, 56, portions of 57, 58 and 64.

27. The agreements for some of the issues were documented, while others were oral. For those issues documented, proposed language was agreed upon for some of the issues, with the understanding that the concepts agreed upon needed to be incorporated into whatever template was ordered to be used in the follow-on agreement. BellSouth and Supra understood and agreed that implementation of the parties' agreements required a three-step process: a) insertion of any agreed language into appropriate locations of the follow-on agreement template; b) followed by the deletion of language throughout the template which may conflict with the parties' agreements; and c) finally, the creation of any other clarifying language necessary to accurately incorporate the parties' intent into the follow-on agreement. This three-step procedure was necessary because, at the time the parties agreed to all of the issues above, there was no agreement as to which template was to be used for the final version.

28. In addition, because of time considerations prior to the evidentiary hearing, the parties agreed in principal on some issues, with the understanding that details would be resolved at a later date. A primary example of these agreements involved Exhibit "B" to Attachment 2 (of the new follow-on agreement). On numerous issues, the parties had agreed to reference a new Exhibit "B" to Attachment 2 (to the follow-on agreement), which was supposed to be a listing of numerous call flows. When the parties agreed upon language to resolve numerous issues, they made reference to this new Exhibit "B," which had not yet been agreed upon. In the spirit of attempted cooperation, the parties initially discussed some of the concepts that each side wanted to include in the

call flow diagrams, and then agreed in principal to devise the form and content at a later date when the parties would have more time.

29. On March 26, 2002, the FPSC entered an order in which the FPSC resolved only those issues which the parties' had presented at the evidentiary hearing. Those issues addressed by the FPSC order were issues B, 1, 4, 5, 10, 11A, 11B, 12, 15, 16, portions of 18, 19, 20, 21, 22, 23, 24, 28, 29, 32A, 32B, 33, 34, 38, 40, 42, 46, 47, 49, portions of 57, 59, 60, 61, 62, 63, 65 and 66.

30. On July 1, 2002, the FPSC entered a second order which a) modified and/or reconsidered portions of the March 26, 2002 order and b) required the parties to submit a jointly-executed agreement by July 15, 2002.

31. During the course of attempting to negotiate the final language for the follow-on agreement, Supra learned that BellSouth had not incorporated many of the concepts or much of the agreed language regarding the issues that the parties had agreed not to include within the evidentiary hearing. And, despite feverish negotiations between BellSouth and Supra, the parties were unable to come to an agreement on appropriate language by July 15, 2002.

32. On July 15, 2002, Supra filed with FPSC a notice of good-faith compliance and a motion to compel BellSouth to continue negotiations toward a follow-on agreement. BellSouth filed a unilaterally-prepared interconnection agreement which had only been signed by BellSouth and which did not comply with the FPSC's prior rulings nor the parties' prior agreements. BellSouth also filed a motion requesting that the FPSC a) force Supra into either executing BellSouth's unilateral interconnection

agreement or another approved agreement pursuant to 47 U.S.C. § 252(i) and b) declare the Current Agreement terminated.

33. On July 22, 2002, Supra filed with the FPSC an opposition to BellSouth's motion in which Supra clearly and specifically detailed the status of all issues in the proceeding and whether or not a dispute exists over BellSouth's proposed implementation in its unilateral interconnection agreement. A true and correct copy of Supra's July 22, 2002 response is attached hereto as Exhibit "E." Composite Exhibit "1" to the response (Exhibit E) is Supra's detailed listing of the status of all issues.

34. In the July 22, 2002, Motion, Supra expressly requested that the FPSC direct BellSouth to continue to negotiate in good faith. (*See In re Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 F.C.C.R. 15594, at Par. 30, 1997 WL 594281 (Sept. 26, 1997). Supra also expressly requested that the FPSC grant Supra mediation regarding the merits for the unresolved issues that had been clearly and specifically set forth in the parties' petition and response in accordance with Section 252(b)(4). *See* Exhibit E, pg. 3 (where Supra writes: "this Commission [FPSC] should order BellSouth to return back to the negotiating table in order to resolve as many disputes as possible . . . Supra would also welcome Commission assisted mediation of this matter. In the event this Commission even considers granting any of the relief in [BellSouth's] Emergency Motion, Supra asks that this Commission first conduct an evidentiary hearing of the factual matters asserted by the parties.")

35. With respect to Supra's detailed listing of the issues (Composite Exhibit "1" to Exhibit E to this Petition), there are numerous disputes regarding BellSouth's proposed implementation of agreed issues and matters that were decided by the FPSC.

With respect to the agreed issues (those in which the merits had **not** been resolved by the FPSC), disputes exists as to at least nine (9) issues. These issues were identified in the FPSC proceeding as Issues 6, 7, 13, 18 (agreed parts), 25B, 27, 37, 53 and 56. **These issues cover important and material portions of the proposed follow-on agreement**. The focus of this petition under Section 252(e)(5) revolves around the nine (9) specific issues in which the FPSC refused to resolve.

36. Notwithstanding, with respect to those issues that were resolved by the FPSC, the parties had disagreements over at least twenty-five (25) issues. These issues were identified in the FPSC proceeding as Issues 1, 10, 11A, 18 (arbitrated parts), 19, 21, 22, 23, 24, 28, 29, 32A, 32B, 33, 34, 38, 39, 40, 46, 47, 49, 57 (arbitrated parts), 59, 60 and 65. Disputes may also exist regarding issues which BellSouth had promised to make changes during negotiations over language to be used in the follow-on agreement, but which changes could not be verified by Supra prior to having to make the above filings with the FPSC.

37. On July 25, 2002, the staff of the FPSC filed a recommendation with the FPSC. The staff recommended that the FPSC grant BellSouth's July 15, 2002 Motion in part by declaring the Current Agreement terminated ten (10) days from the day of the vote. The day the Current Agreement would be considered terminated by the FPSC would be August 16, 2002. The recommendation also recommended that the FPSC should refuse to consider the merits of the remaining unresolved issues which were not subject to an evidentiary hearing, but which were nevertheless properly set forth in the parties' petition and response. With respect to the "agreed upon" issues clearly and specifically set forth and presented in the parties' petition and response, the Staff wrote:

"Supra has had ample opportunity to become familiar with BellSouth's agreement template, and ascertain what parts of the agreement would require modification, both to comply with the parties **agreed upon** and unarbitrated issues, as well as those decided by the Commission." (Emphasis added). A true and correct copy of the staff recommendation is attached hereto as Exhibit "F." *See* pg. 16-17 of Exhibit F.

38. In further justification of its recommended action to the FPSC the Staff wrote: "It is clear that no alternative language was filed by Supra on the required date, July 15, 2002. If Supra continued to disagree with BellSouth's interpretation of issues and inclusive language, Supra could have formulated its own language and submitted that to the Commission in an attempt to comply with the Commission's Order." *See* pg. 17-18 of Exhibit F. Notably, this subsequent comment does not address the agreed upon issues. The FPSC's authority to "pick and choose" language is narrowly focused on language that implements its order with respect to those issues, and those issues only, that had been the subject of a full and fair evidentiary hearing. Filing language with the FPSC and asking the FPSC to "pick and choose" would in effect be a waiver of Supra's right to the statutory requirements that ILECs negotiate in good faith, that the parties request mediation and if necessary arbitration for those issues which remain unresolved.

39. The recommendation also stated that if Supra does not execute either BellSouth's unilateral interconnection agreement or another approved agreement available for adoption under 47 U.S.C. § 252(i), that the relationship between BellSouth and Supra shall be terminated. Finally, the recommendation stated that no party shall be given the right to seek reconsideration of the ruling and that termination of the parties' Current Agreement shall take place prior to the issuance of a written order by the FPSC.

40. On Tuesday, August 6, 2002, the FPSC voted to adopt the staff recommendation without comment. A copy of the vote sheet is attached hereto as Exhibit "G." The staff recommendation adopted by the Commissioners specifically denied Supra's request for a mediation on the merits of the issues which remain unresolved and Supra's request for a further evidentiary hearing on the subject issues.

41. On Friday, August 9, 2002, the FPSC issued Order No. PSC-02-1096-FOF-TP, in which the state commission adopted the staff recommendation verbatim. A copy of the FPSC Order is attached hereto as Exhibit "F."

42. The FPSC's vote illegally terminated the Current Agreement between BellSouth and Supra. However, the Current Agreement, in conjunction with the Federal Arbitration Act, specifically requires BellSouth and Supra to arbitrate any alleged declaration of termination of the Current Agreement. A copy of the relevant portions of the Current Agreement (i.e. General Terms & Conditions and Attachment 1) is attached hereto as Exhibit "B."

43. Neither the FPSC nor BellSouth ever brought a proceeding under the Current Agreement seeking to have it declared terminated and Supra has not and does not waive its rights to have any dispute under the Current Agreement resolved by a panel of arbitrators as required by the Current Agreement.

44. The vote by the FPSC that the Current Agreement is terminated, in the absence of a follow-on agreement between BellSouth and Supra effectively leaves Supra's approximately 350,000 innocent customers without local phone service.

45. The FPSC vote in effect accelerates the time in which Supra is permitted to pursue its rights at the FCC pursuant § 252(e)(5). If Supra insists on waiting the 90

days in which the FCC is permitted to consider whether to issue a preemption order, Supra risks having to endure an immediate full scale interruption of its entire customer base.

Argument

Supra's Petitions Arise Under Section 252 of the Act

46. In the present matter, Supra properly set forth its issues in the initial petition and response. Many issues were withdrawn for consideration prior to the first evidentiary hearing before the FPSC, after Supra relied upon BellSouth's assurances that these issues had been agreed to. BellSouth now refuses to even discuss language necessary to implement the "agreed upon" issues that have never been part of any evidentiary hearing. BellSouth's position is that Supra must accept language BellSouth has unilaterally chosen to implement the unresolved issues.

47. Under this scenario, the question for the FCC is whether the FPSC "failed to act" by denying Supra's request that BellSouth be ordered to continue to negotiate in good-faith, or in the alternative that Supra be granted mediation and if necessary that an additional evidentiary hearing be held for those issues which remain unresolved.

48. The FCC is authorized "to preempt the jurisdiction of any state regulatory commission that fails to act to carry out its responsibility" under Section 252 of the Act. *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 833 (D.C. Cir. 2002).

49. Section 252(e)(5) of the Act, reads as follows:

> [i]f a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter . . . and shall assume the

> responsibility of the state commission under this section with respect to the proceeding or matter and act for the State commission.

50. Specifically, under Section 252(e)(5), the FCC acts in the place of a state commission, if the state commission fails to grant a request for mediation or arbitration for all issues that remain unresolved that were clearly and specifically presented in the parties' petition and response. *See* 47 C.F.R. 51.801(b). *See* also Wisconsin *Bell, Inc. v. Public Service Commission of Wisconsin, et al*, 27 F.Supp.2d 1149 (W.D. Wisc. 1998); *MCI Telecommunications Corporation v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 501 (3rd Cir. 2001).

51. The relevant portions of Section 252 of the 1996 Federal Telecommunications Act reads as follows:

> Sec. 252. Procedure for negotiation, arbitration, and approval of agreements
>
> . . . . .
>
> (b) Agreements arrived at through compulsory arbitration
>
> (1) Arbitration
>
> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.
>
> (3) Opportunity to respond
>
> A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.
>
> (4) Action by State commission

(A) The State commission **shall** limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

. . . . .

(C) The State commission **shall** resolve each issue set forth in the petition and response, if any, by imposing conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

52. – The Act expressly directs State commission to "resolve each issue set forth in the petition and response." The plain language set forth in subsection (4)(A) and (4)(C) could not be more specific. *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1224 (11th Cir. 2001) ("The 'plain' in 'plain meaning' requires that we look to the actual language used in a statute"). When a law is unambiguous, there is no need to resort to legislative history or other extrinsic material. *See Streeter v. Sullivan*, 509 So.2d 268, 271 (Fla. 1987) (where the court affirmed the principle that it is unnecessary to resort to legislative history or cannons of construction if the language is unambiguous on its face). "When the words of a statute are unambiguous, then, this first canon . . . is also the last: judicial [FCC] inquiry is complete." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1224 (11th Cir. 2001) *citing Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997).

53. The Court in *CBS Inc. v. PrimeTime 24 Joint Venture,* went on to write the following:

> "Likwise, we have every reason to believe that the [United States] Supreme Court also meant what it said: 'Given [a] straightforward statutory command, there is no reason to resort to legislative history,' [citation omitted] and we do not resort to legislative history to cloud a statutory text that is clear." [citation omitted]. The reasons for refusing to

> give even clear legislative history more weight than clear statutory language are sound. This Court explained that 'it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. [citation omitted]. When a statute is passed by Congress, it is the text of the statute, and not statements put in some committee report or made on the floor—and certainly not someone's understanding of the circumstances which gave rise to the legislation—that has been voted on and approved by the people's elected representatives for inclusion in our country's laws. The language of our laws is the law." *Id.* at 1227. (Emphasis added).

54. In the present case, the language in Section 252 is plain, clear and straightforward. The Act expressly directs State commissions to "resolve each issue set forth in the petition and response." This process requiring State commission to permit an evidentiary hearing for unresolved issues is necessary for the simple reason that incumbent local exchange carriers (ILECs), like BellSouth, have very little incentive to agree to terms or conditions that would allow a competitive local exchange company (CLEC), like Supra, to actually threaten BellSouth's customer base.

55. The FCC has recognized the competitive disparity that exists between CLECs and ILECs with respect to the negotiation of interconnection agreements and in particular the negotiation of unresolved issues properly presented in a petition and response. In its First Report and Order, the FCC found that Congress imposed this good-faith requirement to negotiate on ILECs, because of the incumbent LEC's lack of incentives and superior bargaining power. The FCC found that an ILECs negotiations with new entrants over the terms of an interconnection agreement would be quite different from typical commercial negotiations. As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants. The Act addresses this problem by creating an arbitration proceeding in which the new entrant may assert certain rights. ¶15 First Report and Order.

56. In the present matter, the parties properly set forth its issues in the initial petition and response. See Exhibit "C" and Exhibit "D." Between the two parties, sixty-six (66) issues were identified for resolution by the FPSC pursuant to 47 U.S.C. § 252(4).

57. The nine (9) "agreed upon" issues in which the FPSC "failed to act upon" are set out in Exhibit E as Issue numbers 6, 7, 13, 18, 25B[2], 27, 37, 53 and 56. In Supra's initial response filed in accordance with Section 252(b)(4), these same issues were clearly and specifically set forth as Issue numbers 6, 7, 13, 18, 25, 27, 37, 53 and 56.

58. As demonstrated, these issues on which Supra sought state commission action were properly set forth in its response in accordance with Section 252(b)(4). *See Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 833 (D.C. Cir. 2002) (where the Court writes: "The FCC's interpretation thus suggests that only if the state commission either does not respond to a request, or refuses to resolve a particular matter raised in a request [252(b)(4)], does preemption become a viable option."). (Underline added for emphasis). In the present matter, the FPSC has refused to resolve several matters clearly and specifically set forth in Supra's response.

59. The phrase "failed to act" encompasses two distinct concepts: (1) incomplete action, and (2) no action. *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 837 (D.C. Cir. 2002). With respect to the concept of "incomplete action" the court's have defined this to encompass when a state commission "neglect[s] to do something," "leave[s] something undone," and "be found wanting in not doing something." *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 837 (D.C. Cir. 2002).

[2] Issue 25 was divided into 25A and 25B prior to the evidentiary hearing on September 26 and 27, 2001. Issue No. 25B subsequently thereafter became an "agreed upon" issue.

60. When these above definitions are coupled with the mandate that a state commission "shall" resolve "all" issues set forth in the parties' petition and response, it well within the bounds of reason to conclude that if "all" of the issues presented in the petition and response are not granted the same procedural due process safeguards as all the other issues included in the petition and response, then the state commission is guilty of "leaving something undone" and "being found wanting in not doing something." In short, "incomplete action."

61. Supra is not asking the FCC to review the underlying reasoning of a decision regarding the merits of the issues set forth in the parties petition and response. In this case, the FPSC has made no decision on the merits of these unresolved issues. The FPSC has not even made any "purported" effort to resolve those unresolved issues properly set forth in the petition and response. *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 837 (D.C. Cir. 2002) (where the court states that the FCC has effectively construed 252(e)(5) as not covering situations in which the state commission at least purports to resolve all the issues presented to it).

62. Supra's petition is different from *In re Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 F.C.C.R. 15594, at Par. 27, 1997 WL 594281 (Sept. 26, 1997). There the FCC did find that "a state agency can fail to act under Section 252(e)(5) where it . . . does not resolve all issues 'clearly and specifically' presented to it." *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 838 (D.C. Cir. 2002). The FCC, however, ultimately declined to preempt the state commission. The FCC found that "the Missouri Public Service Commission had acted on all such issues; other claims that the carrier

argued should have been decided had not been advanced with sufficient clarity and specificity to make the state agency's inaction a 'failure to act' within the meaning of Section 252(e)(5)." *Id.* at 838.

63. In the present matter, Supra has clearly and specifically set forth each unresolved issue in its initial response. These same unresolved issues were detailed again in Supra's July 22, 2002, Motion. Notwithstanding, the FPSC has refused to resolve "all" issues Supra has properly set forth. This incomplete action on the part of the FPSC is a failure to act within the meaning of Section 252(e)(5).

64. The present matter is similar to Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, 2000 WL 767701 (June 14, 2000). In Starpower, the Virginia State Utilities Commission dismissed Starpower Communication's petition for interpretation and enforcement of its reciprocal compensation arrangements with Verizon. Starpower petitioned the FCC for an order preempting the Virginia Commission's jurisdiction. The FCC granted Starpower's request. In Starpower, the Virginia State Utilities Commission expressly declined to resolve the merits of issues properly set forth. The FCC accepted the petition, because the state commission "explicitly declined to take any action." *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 839 (D.C. Cir. 2002). "The FCC went on to note that, under Commission precedent, a state agency fulfills its responsibilities under Section 252(e)(5) 'when it resolves the merits of a section 252

proceeding or dismisses such a proceeding on jurisdictional grounds or procedural grounds." *Id.* at 839. (Underline added for emphasis).

65. In our case, the FPSC did not dismiss Supra's issues clearly and specifically set forth in Supra's initial response on jurisdictional grounds or procedural grounds. For example, if the parties filed a petition for arbitration outside the jurisdictional time parameters outlined in Section 252(b)(1), then it could not be said that the state commission failed to act. This is not the case here. In the present matter, the FPSC has expressly declined Supra's request that BellSouth be ordered to continue to negotiate in good faith and declined Supra's request for mediation for all issues which remain unresolved but which were properly set forth in the parties petition and response. In this proceeding, the FPSC has never addressed the merits of these issues which remain unresolved. This incomplete action on all of the issues is a failure to act. *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 839 (D.C. Cir. 2002).

BellSouth insists on dictating language for agreed upon issues

66. BellSouth position has been and continues to be that Supra must accept whatever language BellSouth dictates with respect to any "agreed upon" issues – properly set forth in the parties' petition and response - that was not contemporaneously written down at the time of the agreement and was not the subject of the evidentiary hearing held on September 26 and 27, 2001, before the FPSC.

67. On March 26, 2002, the FPSC entered an order in which the FPSC resolved only those issues which the parties' had presented at the evidentiary hearing. Those issues addressed by the FPSC order were issues B, 1, 4, 5, 10, 11A, 11B, 12, 15, 16, portions of 18, 19, 20, 21, 22, 23, 24, 28, 29, 32A, 32B, 33, 34, 38, 40, 42, 46, 47, 49,

portions of 57, 59, 60, 61, 62, 63, 65 and 66. On July 1, 2002, the FPSC entered a second order which a) modified and/or reconsidered portions of the March 26, 2002 order and b) required the parties to submit a jointly-executed agreement by July 15, 2002.

68. During the course of attempting to negotiate the final language for the follow-on agreement, Supra learned that BellSouth had not incorporated many of the concepts or much of the agreed language regarding the issues that the parties had agreed not to include within the evidentiary hearing. And, despite feverish negotiations between BellSouth and Supra, the parties were unable to come to an agreement on appropriate language by July 15, 2002.

69. On July 15, 2002, Supra filed with FPSC a notice of good-faith compliance and a motion to compel BellSouth to continue negotiations toward a follow-on agreement. BellSouth filed a unilaterally-prepared interconnection agreement which had only been signed by BellSouth and which did not comply with the FPSC's prior rulings nor the parties' prior agreements. BellSouth also filed a motion requesting that the FPSC a) force Supra into either executing BellSouth's unilateral interconnection agreement or another approved agreement pursuant to 47 U.S.C. § 252(i) and b) declare the Current Agreement terminated.

70. On July 22, 2002, Supra filed with the FPSC an opposition to BellSouth's motion in which Supra clearly and specifically detailed the status of all issues in the proceeding and whether or not a dispute exists over BellSouth's proposed implementation in its unilateral interconnection agreement. See Exhibit "E." Composite Exhibit "1" to the response (Exhibit E) is Supra's detailed listing of the status of all issues.

71. In the July 22, 2002, Motion, Supra expressly requested that the FPSC direct BellSouth to continue to negotiate in good faith. (*See In re Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 F.C.C.R. 15594, at Par. 30, 1997 WL 594281 (Sept. 26, 1997) (in which the FCC writes: "We also remind carriers that they have an ongoing duty, pursuant to section 251(c)(1) to negotiate the terms and conditions of interconnection in good-faith. We strongly encourage state commissions, in addition to satisfying their mediation and arbitration responsibilities under section 252, to enforce vigorously all carriers' duty to negotiate in good faith. We find that only by fulfilling **both** of these **responsibilities** will state commissions provide **new entrants** with the best opportunity to reach a complete and workable interconnection agreements with incumbent carriers."). (Emphasis added). Supra also expressly requested that the FPSC grant Supra mediation regarding the merits for the unresolved issues that had been clearly and specifically set forth in the parties' petition and response in accordance with Section 252(b)(4). *See* Exhibit E, pg. 3 (where Supra writes: "this Commission [FPSC] should order BellSouth to return back to the negotiating table in order to resolve as many disputes as possible . . . Supra would also welcome Commission assisted mediation of this matter. In the event this Commission even considers granting any of the relief in [BellSouth's] Emergency Motion, Supra asks that this Commission first conduct an evidentiary hearing of the factual matters asserted by the parties.")

72. With respect to the "agreed upon" issues (those in which the merits had **not** been resolved by the FPSC), disputes exists as to at least nine (9) issues. These issues were identified in the FPSC proceeding as Issues 6, 7, 13, 18 (agreed parts), 25B,

27, 37, 53 and 56. These issues cover important and material portions of the proposed follow-on agreement. The focus of this petition under Section 252(e)(5) revolves around the nine (9) specific issues in which the FPSC refused to resolve.

73. The FPSC voted[3] on Tuesday, August 6, 2002, on Supra's requests.

74. On August 9, 2002, the FPSC issued Order No. PSC-02-1096-FOF-TP. *See* Exhibit H attached hereto. In this Order the FPSC expressly refused to consider the merits of the remaining unresolved issues which were not subject to an evidentiary hearing, but which were nevertheless properly set forth in the parties' petition and response. With respect to the "agreed upon" issues clearly and specifically set forth, the FPSC wrote: "Supra has had ample opportunity to become familiar with BellSouth's agreement template, and ascertain what parts of the agreement would require modification, both to comply with the parties "**agreed upon**" and unarbitrated issues, as well as those decided by the Commission." (Emphasis added). *See* pg. 14-15.

75. The FPSC fails to address the specific issue raised in Supra's July 22, 2002 Motion: that BellSouth is now refusing to agree to language and concepts that BellSouth had previously agreed to. BellSouth's position was clear that they would dictate the language with respect to the "agreed upon" issues. The FPSC decision in effect affirms BellSouth's dictatorial position and contrary to the protections and relief the 1996 Act was designed to confer on CLECs. Contrary to the FPSC's assertion – in the absence of an order forcing BellSouth to negotiate in good faith, and in the alternative forcing BellSouth to mediation and if necessary subsequent arbitration on the "agreed

[3] *See Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 838 (D.C. Cir. 2002) (where the court states that "the mere issuance of the [state] Commission's final order in each proceeding" was insufficient to fulfill the state agency's responsibilities under Section 252(e)(5)").